No. 15507.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT V. MEDINA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Statement of Facts.

On July 13, 1956, the victim, Ted Sumpter, an inmate of the Federal Correctional Institution at Terminal Island, California, met his death shortly after 8:00 A. M. of that morning. The incident took place in the Carpenter Shop of such Institution. A diagram or floor plan of such Carpenter Shop substantially as it existed on that date is Exhibit No. 1, which presently has been folded and is in a box containing most of the other Exhibits. This diagram, namely, Exhibit 1, may be helpful in reading the testimony of the various witnesses, for, as they testified, they would from time to time refer to such diagram and place marks thereon in conjunction with their testimony.

It appears to be undisputed that the non-appealing defendant, namely, Lawrence Melvin Miles, was the primary actor in the cause of the death of the victim by plunging a dagger into his back.

There was evidence, if believed by the jury, that the appellant Robert V. Medina participated in the incident taking place shortly before Miles stabbed the victim, in that he hit the victim at least once, if not more times, upon the head and face with a hammer, namely, Exhibit No. 5. The case was tried upon the theory that Medina aided and abetted Miles in the murder of the victim and the jury was instructed accordingly. The instructions to such effect are to be noted in the Clerk's Transcript commencing on page 82 thereof and concluding on page 85.

On the morning of July 13, 1956, approximately 12 inmates had entered the Carpenter Shop of such Institution to perform their daily duties, among which were both of the defendants and the victim, Sumpter.

Rex Leon Flood. Mr. Flood was, likewise, an inmate of this Institution of Terminal Island. His testimony commences [R. 39].[1] After having first testified that he recognized both of the defendants Mr. Miles and Mr. Medina and, likewise, knew Mr. Ted Sumpter, he testified that he entered the Carpenter Shop on the morning of July 13, 1956, shortly before 8:00 A. M. [R. 41]. Mr. Flood stated that he first went to the work bench that was set up just off the doorway inside the shop, approximately 5 or 8 feet from the drill press. [R. 43.] (According to Exhibit 1, the diagram, this location is approximately in the middle of the Carpenter Shop.) He stated that Mr.

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[1]"R." refers to the Reporter's typewritten transcript.

Miles was there and that they were working at the same table [R. 43].

He testified that he saw Ted Sumpter as Sumpter came up on the other side of the table and that Mr. Sumpter stated, in the presence of witness Flood and Miles, "I built this for me to use with my work." [R. 44.] Mr. Flood further testified, "Well, he seemed like just his normal manner of conversation. He didn't raise his voice." [R. 44.] Flood further testified that an argument ensued and Sumpter had a hammer in his hand. That after that, "Miles took an offense. He got really mad and said, 'Don't try to push me.' . . . And that is when Sumpter came up with the hammer." [R. 45.]

Flood further testified that after that Sumpter picked up a couple of dowels and went on back with his work. That is to say, he, Sumpter, went back to the little table. a sander back near the back of the Shop [R. 45]. This sander was marked by the witness as "F-2," it is near the westerly side of the Carpenter Shop.

Witness Flood further testified that Miles then left the table and went up to the machine shop tool room [R. 46]. (This machine tool bin or shop is located toward the easterly end of the Carpenter Shop.)

Witness Flood stated that the last time he then saw Miles is as he, Miles, went to the tool room and he indicated the location by placing an "F-3" on the diagram or chart [Ex. 1]. Witness Flood stated that he thereafter saw Miles come out of the tool room and walk back to where Sumpter was and started to argue with Sumpter again [R. 46]. The following questions were asked and answers were given by the witness Flood [R. 47]:

> "Q. By Mr. Neukom: Did you hear any loud voices? A. Yes, sir.

Q. Whose voices? A. I heard Miles say, 'If you pull that hammer on me again, be sure and use it.'

Q. And what did you see Sumpter do? A. He was just standing there with his work.

Q. Then what did you see after that? A. Mr. Medina walked up past where I was standing and he said, 'Well, the man is gone. Now is the time to get him.'

Q. Whom did he address that statement to? A. To Miles.

Q. Where was Medina when you heard that?

Mr. Lavine: I move to strike who he addressed it to as a conclusion of the witness, that he addressed it to Miles. I move to strike it out.

The Court: No. I will deny the motion. Let it remain.

Q. By Mr. Neukom: Where was Medina standing when you heard him make the remark you last told us about? A. Approximately about here (indicating).

Mr. Neukom: We will put M-1—we will put ME-1. (Marking on chart.)

Q. And where was Miles? [R. 48.] A. He was standing up this side of the sander.

Q. And it was over about where the 'D' is in the 'Sander'? A. Somewhere—it would be hard to say. He was on this side of the sander.

Q. I see, and we will put MI-1. (Writing on chart.) Now, what ensued, what took place after that? A. Well, Medina grabbed Sumpter around his neck and I saw him hit him with the hammer.

Q. How many times did you see him hit him with the hammer? A. At least twice, before I could turn and get back to the other end of the shop.

Q. What type of hammer did Medina have in his hand? A. It was a ball peen hammer.

Q. And it appeared to be a hammer similar to Exhibit 5? A. Yes, sir.

Q. Where did he hit him? A. You mean Sumpter?

Q. Yes, Sumpter. A. On this side of the head, right here (indicating).

Q. On sort of the top portion of his head? A. Yes, sir."

The witness thereupon indicated the manner in which the incident took place utilizing Mr. Ludlow, an Assistant United States Attorney, for the purpose of this illustration and reaffirmed that Medina had his arm around Sumpter's neck [R. 49] and he indicated how Medina hit Sumpter on the head. He further testified that Miles was to the right of Medina when this event took place [R. 49]. After observing this the witness stated that he came back to the drill press, which is close to the center of the Carpenter Shop, and placed an "F-4" at the point where he stated he had then gone, and, likewise, at "F-5." The witness then stated that after he saw Sumpter laying on the floor between the benches [R. 50].

The witness Flood stated that after this incident occurred Miles came up and said, "Has anybody called a doctor?" [R. 51] and in answer to what he, the witness, said, he replied as follows:

> "Well, I didn't say much of anything. We just stood around there for a minute. I was reluctant to leave the shop, because you know around a place like that when something happens you are supposed to see nothing, hear nothing and know nothing." [R. 51.]

The witness then proceeded to relate what then transpired, testifying that he and Miles left the building to summon an officer [R. 52 and 53].

The witness Flood was further interrogated and gave answers as follows [R. 53-54].

"Q. Now, you have testified about Medina having his hand around the neck of Sumpter. Did you hear Sumpter make any remark when that first occurred? A. Yes.

Q. What do you recall Sumpter saying? A. He said, 'Knock this stuff off,' or something to that effect, to the effect 'Knock this stuff off.'

Q. Had Sumpter just immediately prior to that been engaging himself in his work? A. Yes, sir.

Mr. Lavine: That is objected to as calling for a conclusion of the witness, and I move that the answer be stricken, your Honor.

The Court: No, I will deny the motion.

Q. By Mr. Neukom: What had you seen Sumpter doing? A. Sanding the little dowels that were six inches long that we were using to stop the ends of those beds. They were too large to fit and he was sanding them off.

Q. The beds were hollow steel beds; is that what you mean? A. Yes, sir.

Q. And you were working placing dowels in the end of them and driving them in? A. Yes, sir.

Q. Is that the proposition? A. Yes.

Q. And that was the work that you had noticed Sumpter doing? A. Yes, sir." [R. 55.]

The witness was then cross-examined and such cross-examination extends from page 56 through a portion of page 69.

Upon redirect examination the witness explained why he had asked for protective custody in that he felt for his safety [R. 69]. Witness Flood further stated from his observations the victim Sumpter did not appear to be the quarrelsome type and that he had never seen Sumpter in any trouble before.

Samuel D. Collins. This witness was likewise an inmate of the Institution. He had also served time for State offenses in a California prison. He stated that he met the victim and, in fact, slept in the same dormitory and that the victim had had a bed on his left side, and that this took place for a period of 3 or 4 months [R. 810]. Witness Collins gave testimony solely concerning the peacefulness of the victim. His answer to such a question was as follows:

> "The Witness: Well, in the first place. Sumpter was a very quiet man, a very well behaved man, didn't bother anyone. Well, to use an expression, he was doing his own time.
>
> Q. By Mr. Ludlow: What does that mean, doing his own time? A. Minding his own business." [R. 811.]

When further interrogated he stated with respect to the victim, "He was not a quarrelsome person; just the opposite" [R. 812], and further stated that he had never seen any quarrels going on in which Mr. Sumpter was involved [R. 817].

Trinidad Mada Leon. Witness Leon was likewise an inmate of the Institution. He stated that he did not see Medina do anything to Sumpter [R. 73]. He placed Medina near Sumpter, stating they were talking, arguing, or something like that and that he saw Medina have a hammer in his hand and that he took the hammer from

Medina [R. 74], that Medina was very close to Sumpter and that Miles was on the left side of Sumpter, namely, on the right-hand side of Medina [R. 75]. Witness Leon further testified that he looked at Sumpter's face and eyes for just a fraction of a second before Sumpter fell over and that Sumpter's eyes looked "glassy" and that is when he pulled the hammer from Medina [R. 80]. The witness explained where he took the hammer and where he dropped it over on the side of the table.

Edward Allen Shivel. This witness was likewise an inmate of the Institution. He stated that on the morning of July 13, 1956, he saw Medina with a hammer in his, Medina's hand, and he also saw Sumpter with a hammer in his, Sumpter's hand, and that it looked to him like Sumpter was taking a swing at Miles and that after that he saw Leon take a hammer away from Medina [R. 254-255].

This witness further explained, "Well, you can usually tell when somebody is going to get in a fight, so you just naturally don't pay any attention. And . . ." [R. 255].

After the witness had indicated where both Medina and the others were concerning the incident he had testified to, he stated that thereafter he saw Sumpter go down on the floor [R. 258].

Lawrence Melvin Miles. This co-defendant, who was found guilty of second degree murder, has not appealed and inasmuch as appellant Medina has referred to certain of his testimony in his brief under the heading "The Facts" we shall but briefly refer to his testimony.

Defendant Miles admitted that he had prepared Exhibit 8 into a knife about 3 weeks prior to the time of "the ac-

cident" [R. 715]. He had explained why he walked up to Sumpter with the knife hidden in his jacket and had let Sumpter know he had had a knife because he didn't want to fight Sumpter and because he was scared of him, and that he had told Sumpter never to come near him again with a hammer and that is when Medina first walked up [R. 697-698].

Defendant Miles then proceeded to relate where he had concealed the knife made from a chisel and his version of how the incident occurred. Defendant Miles conceded upon cross-examination that he was a friend of the witness Flood and that he had had no quarrel with Flood [R. 733].

Robert Victor Medina. Mr. Medina, the sole appellant to this case, appeared as a witness on his behalf. His testimony commences on page 751 and since this testimony is relatively short and is, of course, of the utmost importance to Mr. Medina we shall refrain from attempting to summarize the testimony he gave on direct examination recognizing that this court will carefully read all of such testimony.

It is, however, to be observed that when Mr. Medina testified that he conceded he was present during an argument that he stated was transpiring between the victim and Miles and that, in fact, he stated to Sumpter "Knock it off" [R. 758]. The appellant Mr. Medina further testified concerning his version of the incident between Miles and Sumpter and with respect to the ball peen hammer [R. 759].

Medina stated that he did not at any time strike Sumpter and that he did not at any time intend Sumpter to be killed or injured and that after the incident had occurred

where the hammer had been taken out of his, Medina's, hand, that Medina walked away, that is, back to the tool bin where he stated he had started to originally [R. 763].

The cross-examination of the defendant Medina commences on page 770 of the Reporter's Transcript. That portion which deals with the inquiry of previous sentences imposed on Medina by the Military court in Korea will be referred to later under a subject heading dealing with the propriety to make such inquiry which has been challenged as error on page 18 of appellant's opening brief.

During the further portion of such cross-examination Medina was inquired of if he had been interviewed by Mr. Walker (an FBI Agent) at about 3:45 on the afternoon on the day that Mr. Sumpter met his death. His answer was "A—Oh, yes, I remember that emphatically." Mr. Medina then proceeded to state that during such interview he did not even answer his name "or nothing" [R. 773].

Counsel then representing the Government sought to lay a proper foundation concerning the interview had on the afternoon of February 13, 1956, between FBI Agent, Mr. Walker, and the defendant Medina. This was done upon the premise of impeachment, namely, that Mr. Medina had given a contradictory or inconsistent statement at such time to the FBI Agent, Mr. Walker, wherein Medina had then denied any participation in the incident pertaining to the death of Sumpter.

After which and commencing on page 774 of the Reporter's Transcript several questions were put to the defendant Medina in the form of laying a foundation as to whether he had told Agent Walker certain things when interviewed in the afternoon of July 13, 1956.

This will not be repeated at this point. Suffice is to say, Medina stated that he did not tell Walker anything. In fact, he stated he told Walker "absolutely nothing."

Kenneth C. Walker. Mr. Walker was one of the FBI Agents assigned on July 13, 1956, to conduct an investigation pertaining to the death of Mr. Sumpter. He stated that about the hour of 3:45 P.M. he interviewed Medina on July 13, 1956, in the office of the Associate Warden [R. 788], and that he made a log as to the period of time and a memorandum of the interview. This was marked in identification as Government's Exhibit 54 [R. 789].

At this point objection was made to such testimony. The Government sought permission to reopen its case and the Court granted such request [R. 791]. Counsel for Mr. Medina was permitted to take Mr. Walker upon *voir dire* and examined the FBI Agent Walker pertaining to his notes, namely, Exhibit 54, of the interview had with Mr. Medina. Among other things, Mr. Walker stated that the defendant Medina had denied knowledge of the stabbing incident [R. 795]. Mr. Walker then proceeded to state all the information he had secured on that afternoon from the defendant Medina, such as his name, his age, place of birth, home address, etc. [R. 797-798]. Agent Walker then proceeded to state the substance of what information Medina had given him in such interview concerning the Sumpter homicide. The sum and substance of such testimony was that Medina had denied any participation in the incident pertaining to the death of Sumpter, but instead had said that he was to the other end of the Carpenter Shop in the machine tool bin during such incident and that at no time had he approached or went near where Sumpter was located and

that he only saw Sumpter when he, Sumpter, was being carried from the machine Carpenter Shop [R. 799-800]. Also see Exhibit 54 for identification, Agent Walker's notes of this interview.

Dr. Gerald K. Ridge. Dr. Ridge was the autopsy surgeon who performed the autopsy on the body of the victim. He testified concerning wound No. 1, a dark reddish area or an abrasion underlying the left cheek of the victim, and of wound No. 2, a wound on the left back portion of the scalp [R. 548]. The Doctor stated that in his opinion it would be possible for the hammer, Exhibit 5, to produce the wound occurring on the head of the victim, namely, wound No. 2 [R. 556]. The Doctor likewise testified as to the third wound, namely, a stab wound, which was undoubtedly the primary cause of the death. His conclusion as to the cause of the death is to be noted [R. 567]. In response to an inquiry concerning a violent blow, the Doctor's testimony was as follows:

> "Q. Doctor, the actual bone on the top of the head was not fractured, was it? [R. 585.]
>
> A. No, it was not.
>
> Q. And if there had been a violent blow on the head, it is most likely that the skull would have been fractured, isn't that right, Doctor? A. No. That does not follow.
>
> Q. Well, would it follow in the normal course of events, would a real violent blow on the head with a hammer result in a skull fracture? A. Not of necessity.
>
> Q. Not of necessity? A. No, sir."

We note what we believe to be a mistake on page 4, line 6 of appellant's opening brief, to the effect that

Sumpter ". . . had a previous conviction for checks" to his sentence in violation of the Dyer Act. We recall no such testimony, however each and all of the inmates were, of course, persons convicted of one or more offenses.

The Judgment, or Sentence. The judgment and sentence is on pages 101 and 102 of the Clerk's Transcript, as to the defendant Medina it was, ". . . for imprisonment for a period of Ten Years, to be served concurrently with the sentence the defendant is now serving. . . ."

I.

There Was Sufficient Evidence to Support the Verdict as to the Guilt of Medina. The Court Properly Denied the Motion for Judgment of Acquittal.

The case was tried upon the theory that Miles and Medina were joint participants in the acts that led to the death of the victim Sumpter. The jury was so instructed, especially as to the rule of law pertaining to "Principals" and aiding and abetting the commission of an offense. [See Clk. Tr.[2] p. 82 *et seq.*, where the court correctly instructed the jury in accord with 18 U. S. C., Sec. 2, "Principals".]

It is true that there was a conflict in the testimony between that of the witness Flood and the defendants, however, there was evidence, if believed by the jury, to the effect that Medina had used a hammer and struck Sumpter on the head at or prior to the time that Miles ran the dagger, Exhibit No. 8, into the back of Sumpter [R. 48].

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[2]Clk. Tr. refers to the Clerk's typewritten Transcript of Record.

There was also evidence to the effect that just prior to the stabbing Medina stated to Miles.

> ". . . Well, the man is gone. Now is the time to get him." [R. 47.]

Also that at the time of the accident Medina grabbed Sumpter around his neck and hit Sumpter with the hammer [R. 48-49]. Thus there was evidence of voluntary joint participation by Medina in the fight that culminated in Sumpter's death. Credibility and conflict were matters for the jury to decide.

The evidence is also susceptible of the conclusion that any quarrel that had previously been going on at the outset between Miles and Sumpter had subsided and that Sumpter had returned to his work when shortly thereafter he was attacked by Miles and Medina and as a result met with his death [R. 45].

The requirements as to what constitutes Manslaughter, *i.e.,* Voluntary *Manslaughter* as provided for by the Federal Statute, *i.e.,* 18 U. S. C. A., Sec. 1112(a), had been fully met:

> Sec. 1112 *"Manslaughter*
>
> (a) Manslaughter in the unlawful killing of a human being without malice. It is of two kinds: 'Voluntary—Upon a sudden quarrel or heat of passion'."

The Court was careful to instruct on the elements required to be established both as to Murder and Manslaughter and no objection was made to such instructions. Such was likewise the case as to the law applying to self defense and the non-requirement to retreat before one may act lawfully in self defense. The instructions submitted by the defense on these issues were numerous, and

they were rightfully given by the Court. By way of illustration, instructions given dealing with subjects such as "accident," "the use of neessary force to protect from wrongful injury," the right of "self defense," and kindred defenses, start at page 72 of the Clerk's Transcript and continue on through a portion of page 82 of such transcript.

The quarrel between Miles and Sumpter, had subsided upon Sumpter's peaceful return to his work [R. 45]. Medina had not been a party to this original incident, and could not justify his participation in the later conflict which resulted in Sumpter's death. His option to so participate was surely voluntary, unwarranted, and was sufficient to justify the jury's verdict of Voluntary Manslaughter.

The rule that pertains to a Motion for Acquittal is Rule 29 of the F. R. C. P.

The case of *Curley v. United States,* 160 F. 2d 229 (C. A. D. C., 1947), cert. den. 331 U. S. 837, rehg. den. 331 U. S. 869, applies to the conflict in this case. The holding in the *Curley* case, regarding matters to be considered by the Court in ruling upon such a motion is that if the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the decision is for the jury to make (*ibid.* pp. 232-233).

The trial court was correct in its rulings and is fully supported by the evidence of the case and the governing law. When a motion for a judgment of acquittal is made, the law appears to be that the sole duty of the trial judge is to determine whether substantial evidence, taken in the light most favorable to the Government, tends to show the defendant is guilty beyond a reasonable doubt. *Hemphill v. United States,* 120 F. 2d 115, 119 (C. A. 9), cert.

den. 314 U. S. 627; *Mills v. United States,* 194 F. 2d 184 (C. A. 4); *Pritchett v. United States,* 185 F. 2d 438 (C. A. D. C.), 341 U. S. 905; see also *Gorin v. United States,* 111 F. 2d 712 (C. A. 712, 721 (C. A. 9), aff. 312 U. S. 19. No quantity of contradictory evidence will authorize the trial court to direct a verdict if there is sufficient substantial evidence to take the case to the jury. *Ross v. United States,* 197 F. 2d 660, 665 (C. A. 6). The Court of Appeals in considering the question presented when a judgment of acquittal has been denied should not weigh conflicting evidence, for the weight of conflicting evidence is not for the Court of Appeals, which Court will only determine questions of the sufficiency of Government's testimony to go to the jury and to sustain the verdict of conviction. *May v. United States,* 175 F. 2d 994, 1006, 1007 (C. A. D. C.), cert. den. 338 U. S. 830, citing as authority the *Curley* case (160 F. 2d 229). To like effect *Elwert v. United States,* 231 F. 2d 928, 933 (C. A. 9, 1956).

Substantial evidence has been defined. *Woodward Laboratories, Inc., et al. v. United States,* 198 F. 2d 995 (C. A. 9, 1952), p. 978:

> "Substantial evidence is . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

See also:

> *Battjes v. United States,* 172 F. 2d 1, (C. A. 6, 1949).

The Court was likewise careful to instruct on the subject of "Manslaughter" [Clk. Tr. p. 68]. "Heat of Passion and Provocation" [Clk. Tr. p. 68].

II.

No Error Was Committed by the Court in Permitting Cross-Examination of the Defendant Regarding His Two Military Convictions Sustained While in Korea.

It is true that it is the more favored practice, for the purpose of impeachment, to inquire of a defendant who gives testimony as to whether or not he has ever been convicted of a felony, one or more, and then to elicit the nature or character of such conviction and then rest the matter of such inquiry. However, in this case, no doubt for the purpose of taking the sting out of such impeachment, which is generally left to the cross-examination, the second question counsel for the defense placed to the defendant Medina was not if Medina had been convicted of a felony, rather, as follows [R. 751]:

> "Q. And are you serving a military sentence at the present time? A. I am.
>
> Q. And the sentence is for what offense? A. Murder.
>
> Q. Mr. Medina, did you get sentenced by a court or by a court martial? A. I got sentenced by a general court martial of the United States Army in Korea.
>
> Q. And were you in the army of the United States in Korea at the time? A. I was."

This inquiry was not followed by asking the defendant if the conviction of murder was the only felony type conviction he, Medina, had sustained. Surely, counsel for the defense must have been aware that Medina had sustained a prior military conviction of a felony nature, besides that of the murder conviction that he so willingly produced by his second question to his client Mr. Medina.

The question complained of, that the prosecution put to the defendant Medina concerning a "previous sentence" of "seven years" was asked in perfect good faith [R. 770]. The prosecutor was possessed of information to the effect that Medina while in Korea had, in addition to his conviction of murder, received a seven-year sentence by court martial for violations of Articles of War 61, 64, 69 and 98, following which, he, Medina, had escaped on March 12, 1946, from the stockade at Pung Song and on the following day Medina was involved in the killing by knifing of a Miltary Police Officer at Seoul, Korea.

It is true there was no evidence introduced to support the above statement; such would hardly have been proper. However, it was known to the prosecutor that such a seven year sentence had been imposed, which certainly constitutes an offense of a felony as defined by 18 U. S. C., Section 1.

No effort was made by the government to introduce a certified copy of such Military sentence of seven years, but instead the prosecutor quite properly inquired of Medina if he had also sustained such conviction. He, Medina, was inquired of:

> "Q. As a matter of fact, the murder that you were convicted of was following your escape from another sentence, wasn't it? A. It was." [R. 772.]

The prosecution did not pursue the matter further nor offer any additional evidence of such prior Military conviction although it would have been privileged to have done so.

The possible error of such inquiry was also offset by an answer the defendant Medina made prior to admitting such previous sentence, because he was permitted to state

his entire explanation of such sentence which surely had a tendency to paint him as a freed man and one that asserted he had done a heroic act so far as the Russian secret police were concerned, for he, Medina, also testified as follows [R. 771]:

> "The Witness: That sentence that you claimed there, sir, was disavowed by the President of the United States afterward, and I did not know it was disavowed or made void because I had got convicted of—maybe you will find it there—of mayhem against the Russians secret police and they were stealing horses which they had stolen from us, I had stolen them back, so they claimed, and I received the seven years. Believing it to be unjust, I told them in exact words, 'You can't hold me. I'm leaving.' So I left." [R. 771].

It has been held that although the cross-examination pertaining to convictions was allowed to take a somewhat wider range than is ordinarily justified, that since the defendant admitted the conviction no prejudice results and the matter is one largely within the discretion of the trial court. *Arnette et al. v. United States,* 158 F. 2d 11 (C. A. 4, 1946).

A case somewhat comparable to the instant one is *Banning v. United States,* 130 F. 2d 330 at page 338 (C. A. 6, 1942). In the *Banning* case, upon cross-examination the defendant was asked if he had not thrown red pepper in the Deputy Sheriff's eyes and took his pistol from him and shot the Deputy while he was being transferred to prison. This inquiry was considered not proper, but nevertheless held not to be reversible error, inasmuch as the defendant admitted the incident occurred, but that another prisoner was the guilty person

and that he had taken no part in the incident. The Court stated at page 338:

> ". . . Appellant answered the question favorably to himself and there was no effort to rebut his answer. Thus, as the record stands there is no evidence that he committed the offense about which the District Attorney questioned him" (citing cases).

Such was likewise the situation in the instant case.

It is of course well settled that when a defendant attempts to exonerate himself of charges made against him, his credibility as a witness is in issue and evidence of prior convictions are admissible for that purpose. *Newman v. United States,* 220 F. 2d 289 (C. A. 5, 1955) (Cert. Den. 350 U. S. 824.

Where a defendant on direct examination testified as to a conviction for one crime committed in Italy he could properly be cross-examined on the subject of other convictions in Italy. He could likewise be cross-examined as to statements made in his application for immigration visa and naturalization which failed to disclose such convictions. *United States v. Rossi,* 219 F. 2d 612 (C. A. 2, 1955) Cert. Den. 349 U. S. 938.

It has been held by the California courts that although a prior conviction was admitted that it was not error to cross-examine as to such previous conviction. *People v. Garrow,* 278 P. 2d 475, 481 (1955), 130 Cal. App. 2d 75 Cert. Den. 349 U. S. 933.

III.

No Error Was Committed by the Court in Permitting the Cross-Examination of Medina Concerning a Statement He Had Given to FBI Agent Walker.

On page 20 of appellant's opening brief it is urged that the cross-examination of Medina concerning a statement he had given to FBI Agent Walker exceeded the scope of the direct examination.

We shall endeavor to show (1) That such examination was proper on the theory of impeachment by the use of an inconsistent or contradictory oral statement made by Medina on the afternoon of the murder to the testimony he gave on direct examination; and (2) That such cross-examination was proper and not beyond the scope of the direct examination, in view of the testimony offered by Medina upon direct examination.

In the course of FBI Agent Walker's investigation he and other agents attempted to interview all inmates who had been in the Carpenter Shop on the morning of July 13, 1956. In so doing at about 3:45 P.M. of that afternoon he interviewed Medina and made notes of such interview. [See Ex. 54, Agent Walker's notes of such interview.]

This interview resulted in Medina disclaiming any participation in the incident leading to the death of Sumpter, he gave Agent Walker an exculpatory statement. Such being so, the government obviously would not attempt upon its case in chief to have Agent Walker testify to a statement made by Medina that freed Medina from any complicity in the homicide. This statement was not material until Medina had given a different version of the incident during his testimony to that which he had

stated to Agent Walker. Medina conceded that he was interviewed by Mr. Walker on the day that Mr. Sumpter met his death, he respondent:

> "A. Oh, yes, I remember that emphatically." [R. 773.]

Medina then proceeded to state that he told Walker "nothing" . . . "did not even answer my name" [R. 773]. After having admitted the interview but denying making the statement the government proceeded to lay a foundation for impeachment, questions in that regard started at page 774, line 14 and continue for several pages of the Reporter's Transcript.

After the conclusion of the testimony of Mr. Medina, Agent Walker was recalled to the stand for the purpose of relating the substance of the statement taken from Medina in conflict with the testimony Medina had given at the trial.

Case Reopened. The defense objected and permission was requested by the government to reopen the case, which request was granted [R. 791]. It appears to be elementary that a case may be opened for further evidence in the discretion of the trial court. Cyc. of Federal Procedure, Vol. 12, Sec. 58:135. To like effect, *Kuhn v. United States,* 24 F. 2d 910, 914 (C. A. 9) Cert. Den. 278 U. S. 605; *Lutch v. United States,* 73 F. 2d 840, 841 (C. A. 9). *Hangen v. United States,* 153 F. 2d 850 (C. A. 9).

Mr. Walker's testimony concerning the statement he had taken from Medina clearly effected his credibility. In the statement Medina had made to Agent Walker on the afternoon of the homicide Medina had among other things denied any participation in the incident that led to the

death of Sumpter, indeed, he had stated that he was at another end of the shop—"that he had remained in the machine tool bin, and that he at no time approached or went near where Sumpter was located and that he only saw Sumpter when he was being carried from the machine carpenter shop." [R. 799-800.]

It is settled law that a defendant who takes the stand may be cross-examined the same as any other witness. *Madden v. United States,* 20 F. 2d 289, 292 (C. A. 9, 1927), cert. den. 275 U. S. 554; *Raffel v. United States,* 271 U. S. 494 (1926).

This court has stated, *Cossack v. United States,* 63 F. 2d 511 (C. A. 9, 1933), p. 516:

> "It is elementary, of course, that on cross-examination a witness may be asked whether he did not make certain statements inconsistent with his present testimony." (citing cases).

It is not error to require a defendant offering himself as a witness upon a second trial and denying the truth of evidence offered by the prosecution to disclose upon cross-examination that he had not testified at the first trial, and to explain why he did not deny the same evidence when then offered. *Raffel v. United States,* 271 U. S. 494 (1926).[3]

The propriety of introducing statement made by a witness at another time for the purpose of impeachment seems

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[3]It is true that the *Raffel* case has been recently distinguished by the Supreme Court in: *Grunewald v. United States,* 353 U. S. 391, 418 (1957). In the *Grunewald* case, one of the defendants had been subpoenaed before a grand jury, his refusal to answer upon the grounds of self incrimination, offered for the purpose of impeachment, was held to have been erroneously presented at his later trial.

to be firmly established. *Ryan v. United States,* 58 F. 2d 708, 710 (C. A. 7, 1932); *Lee Dong Sep v. Dulles,* 220 F. 2d 264 (C. A. 2, 1955); *Mahoney v. United States,* 26 F. 2d 902 (C. A. 4, 1928) (Rev. on other grounds).

(1) When a Defendant Testifies to His Intent Wide Latitude Should Be Permitted Upon Cross-Examination.

Medina had testified upon direct as to his non-complicity in the incident, except by accident, and of his non aiding or abetting Miles in the use of the knife [R. 761] and that he did not at any time use the hammer on the head of Sumpter [R. 762]. He did however testify concerning the scuffle between Miles and Sumpter and his participation and of his explanation of how it occurred [R. 758-762]. This despite the fact that on the very afternoon following the death of that morning he had denied any complicity with the Sumpter-Miles incident. It hence became material to attack his credibility through cross-examination.

The scope that is permitted of cross-examination of a defendant is well stated in *United States v. Lowe,* 234 F. 2d 919, 922 (C. A. 3, 1956):

> "The second reason why there was no error in the exploration of this subject is that it was cross-examination. When a defendant takes the stand in a criminal case he is subject to cross-examination as any other witness is. No authority needs to be cited for the proposition that one of the purposes of cross-examination is to test the credibility of the witness and, subject to the judge's control, that cross-examination may go rather far. The scope of direct examination poses no limitation in this respect. Here the cross-examination was very material in testing the credibility of the defendant. See United States

v. Pagano, 2 Cir., 1955, 224 F. 2d 682, 685, certiorari denied 350 U. S. 884, 76 S. Ct. 137."

This court has stated in *Austin v. United States,* 4 F. 2d 774, 775 (C. A. 9, 1925):

". . . But it is not prejudicial error to admit testimony in rebuttal which should have been offered as part of the main case, unless the party against who the testimony is admitted is denied the right to controvert or contradict it, and there was no denial of that right in this case."

As stated in *Raffel v. United States,* 271 U. S. 494 (1926) p. 497:

". . . His waiver is not partial; having cast aside the cloak of immunity, he may not resume it at will, whenever cross examination may be inconvenient or embarrassing."

And as said in *Davis v. United States,* 229 F. 2d 181 186 (C. A. 8, 1956):

"Mr. Justice Sutherland, sitting as a Circuit Justice in the case of United States v. Manton, 2 Cir., 107 F. 2d 834, 845, said:

'* * * The office of cross-examination is to test the truth of the statements of the witness made on direct; and to this end it may be exerted directly to break down the testimony in chief, to affect the credibility of the witness, or to show intent. The extent to which cross-examination upon collateral matters shall go is a matter peculiarly within the discretion of the trial judge. And his action will not be interfered with unless there has been upon his part a plain abuse of discretion. 3 Wharton's Criminal Evidence (11th Ed.) §1308. See Alford v. United States, 282 U. S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624.'"

The cross-examination was germane to the testimony brought out upon direct examination. The proper limit for fair cross-examination is a matter within the sound discretion of the trial court. A defendant who takes the stand may be cross-examined as fully as any other witness. (*D'Aquino v. United States,* 192 F. 2d 338, 369 (C. A. 9, 1951), and many authorities therein cited, including *Powers v. United States,* 223 U. S. 303 at p. 315.) This is the rule concerning matters pertinent to his examination in chief. The cross-examination in the *Powers* case, which was approved, brought out defendants working near a still. To similar effect, *Berra v. United States,* 221 F. 2d 590 at pages 594 and 597 (C. A. 8, 1955). If a defendant testifies to his intent, the field is rather wide open on cross-examination as to all other relevant facts. *United States v. Bradley,* 152 F. 2d 425, 427 (C. A. 3, 1945), where it is stated on page 426:

> ". . . The decision of the Supreme Court in Johnson v. United States, 318 U. S. 189, 195, 63 S. Ct. 549, 552, 87 L. Ed. 704, is pertinent. Mr. Justice Douglas stated, 'His (the defendant's) voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all.' "

The extent to which the broad cross-examination of a defendant is allowed is noted in the case of *United States v. Buckner,* 108 F. 2d 921, 927 (C. A. 2, 1940).

To similar effect *re* cross-examination of a defendant: *Salerno v. United States,* 61 F. 2d 419, 424 (C. A. 8, 1932), where on page 424:

> "The right of cross-examination is not confined to the specific questions or details of the direct examination, but extends to the subject matter inquired about."

IV.

The Questioning by Agent Walker of Medina Did Not Violate Any Constitutional Right of Appellant nor Was It Adverse to the McNabb Rule.

The record will clearly reveal that the Agents of the FBI were questioning, and properly so, all inmates who had been in the Carpenter Shop on the morning that Sumpter was killed. Medina was questioned at about 3:45 P. M. of the afternoon of that same day [R. 788]. The *McNabb* rule (318 U. S. 332) does not control; rather, the case that is controlling is the later Supreme Court case of *United States v. Carignan,* 342 U. S. 36 (1951). In the *Carignan case* the *McNabb & Upshaw* (335 U. S. 410) are distinguished.

In the *Carignan* case, as here, the confession, which was objected to but which the Supreme Court held was proper, was obtained from an accused who was in custody with respect to a previous arrest or charge. In the instant case Medina's detention was legal because he was serving a sentence for murder committed in Korea. In the *Carignan* case the accused was being held for another offense, namely, for an assault charge, when during such custody he gave a confession admitting another offense, namely, murder. In neither case was there an unlawful detention. Under such circumstances Rule 5 of the Federal Rules of Criminal Procedure did not then apply because Medina was not under arrest for the murder of Sumpter. He was merely being interrogated as to what he knew, if anything, concerning such incident. There was no occasion to have then brought him before a magistrate because he

was already lawfully in custody and was not then arrested for complicity in aiding in the killing of Sumpter. As stated in the *Carignan* case, page 44:

> "The police could hardly be expected to make a murder charge on such uncertainties without further inquiry and investigation. This case falls outside the reason for the rule, *i.e.,* to abolish unlawful detention."

The true test in all instances is whether the statements, admisssions or even exculpatory statements were voluntary or not and, as the Court stated on page 39 of the *Carignan* case, the rule is as follows:

> "So long as no coercive methods by threats or inducements to confess are employed, constitutional requirements do not forbid police examination in private of those in lawful custody or the use as evidence of information voluntarily given."

In the *Carignan* case it is further stated (p. 45):

> ". . . We decline to extend the McNabb fixed rule of exclusion to statements to police or wardens concerning other crimes while prisoners are legally in detention on criminal charges."

It is further to be recalled that when Medina was interviewed on the afternoon of July 13, 1956 by Agent Walker, he made no admission or confession, Medina then denied any complicity in the incident that caused the death of the victim [R. 799-800] also see Exhibit 54.

V.

No Error Was Committed in Giving the "Allen" Instruction. Generally, a Juror's Affidavit Is Not Admissible to Impeach the Verdict.

The Clerk's Transcript, page 103, contains a copy of an affidavit of one of the jurors, namely, Carolina A. Resch, to the effect that she was influenced and caused to surrender her views of not guilty by an instruction given during the second day of deliberations. This is the so-called "Allen" instruction. It appears in the Clerk's Transcript commencing on page 93. The propriety of this instruction has repeatedly been sustained by this Court. One of the more recent decisions in approval of such instruction is *Hutson v. United States,* 238 F. 2d 167, 173 (C. A. 9, 1956).

To like effect:

Shibley v. United States, 237 F. 2d 327-333 (C. A. 9, 1956);

Kawakita v. United States, 190 F. 2d 506, 521 (C. A. 9, 1952), affd. 343 U. S. 932;

Allen v. United States, 164 U. S. 492, 501 (1896).

On a Motion for New Trial, affidavits and testimony of jurors ordinarily are not admissible to impeach the verdict, at least where the matter sought to be raised is inherent in the verdict and no corruption or extraneous influence from the outside is involved. In accordance with public policy ordinarily jurors in a criminal case in the Federal Courts will not be heard for the purpose of impeaching their verdict. Cyc. of Fed. Proc., Vol. 11, Sections 48.373 and 49.53.

An early and often quoted authority on the proposition that public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict is that of *Mattox v. United States,* 146 U. S. 140, 148 (1892)—unless they arise from facts of outside or extraneous influence.

To like effect with regard to an attempt to impeach a verdict with a matter which inhered in the verdict.

> *Bryson v. United States,* 238 F. 2d 657, 665 (C. A. 9, 1956).

United States v. Furlong, 194 F. 2d 1, 4 (C. A. 5, 1952), cert. den. 343 U. S. 950 p. 4:

> "It is axiomatic that an affidavit of a juror as to what occurred in the jury room during the deliberations of the jury, will not be considered, for sound public policy prohibits impeachment of a verdict by a member of the jury who participates in it."

> *Armstrong v. United States,* 228 F. 2d 764, 768 (C. A. 8, 1956);

> *Young v. United States,* 163 F. 2d 187, 188 (C. A. 10, 1947), cert. den. 332 U. S. 770.

Indeed, there is considerable authority that generally jurors should not be questioned after their verdict, and that such questioning is disapproved:

> *United States ex rel. De Vita v. McCorkle,* 133 Fed. Supp. 169, 179 D. C. N. J., 1955);

> *United States v. El Rancho Adolphus Products,* Inc., 140 Fed. Supp. 645, 653 D. C. Pa., 1956).

There is nothing in the affidavit of juror Resch [Clk. Tr. 103] of facts to show any improper extraneous influence, indeed the matters there recited essentially inhere in the verdict.

In Conclusion.

It is respectfully submitted that the judgment of conviction herein being reviewed should be affirmed.

Respectfully submitted,

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